83-107

No. ____

Office-Supreme Court, U.S.
FILED
JUL 18 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COMMITTEE FOR AN INDEPENDENT P-I, a corporation; PEOPLE OPPOSED TO A ONE-NEWSPAPER TOWN, an association; COMMITTEE FOR A FREE PRESS, an association; LONGVIEW PUBLISHING COMPANY, a corporation; ROBINSON COMMUNICATIONS, INC., a corporation; and NORTHSHORE PUBLISHING COMPANY, a corporation,

Petitioners,

v.

WILLIAM FRENCH SMITH, Attorney General of the United States; THE HEARST CORPORATION, a corporation; and SEATTLE TIMES COMPANY, a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM L. DWYER
JOHN S. EBEL
KATHLEEN L. ALBRECHT

CULP, DWYER, GUTERSON & GRADER
27th Floor, One Union Square
Seattle, Washington 98101-3143
Attorneys for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Can two newspaper proprietors obtain an antitrust exemption from the Attorney General under the Newspaper Preservation Act (hereinafter "the Act"), 15 U.S.C. § 1801 *et seq.*, so as to end commercial competition between themselves and engage in price-fixing, market allocation, and other conduct which would violate the Sherman Act, 15 U.S.C. §§ 1 and 2, where buyers who could and would continue the independent operation of the allegedly "failing" newspaper have sought to acquire it and are still available, and the applicant-owner has prevented the full exploration of that alternative by rebuffing all inquiries with the statement that the newspaper is not for sale?

2. Can two competing newspaper proprietors obtain an antitrust exemption for a proposed joint operating arrangement under the Act, 15 U.S.C. § 1801 *et seq.*, where the two newspapers will continue publishing independently if the exemption is denied, *i.e.*, there is no showing of a probable future closure by either of them?

3. Can the finding required under the Act, 15 U.S.C. § 1803(b), that approval of a proposed newspaper joint operating arrangement would "effectuate the policy and purpose" of the statute, be made where the editorial voices of smaller competing newspapers would be impaired by the proposed arrangement, and where the terms of the arrangement are unnecessarily destructive of competition?

4. In light of the freedom of the press guaranty of the First Amendment, can the federal government grant an extraordinary antitrust exemption to the two largest newspapers in a market, and thereby empower them to weaken or extinguish competing editorial voices of smaller newspapers in the same market, by licensing the two applicant newspapers to engage in collusive conduct which is forbidden to all the others by the criminal and civil provisions of the Sherman Act, 15 U.S.C. §§ 1 and 2?

5. Can that portion of the Act, 15 U.S.C. § 1803(b), which would permit an appointed official of the executive branch to decide which newspapers will receive favored treatment and which will not, according to his subjective notions of which applications would "effectuate the policy and purpose" of the statute, be allowed to stand in view of the constitutional prohibition of vague and overbroad delegations of licensing power in an area affecting the exercise of First Amendment rights?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS	2
STATEMENT OF THE CASE	2
Summary	2
The Sherman Act And The Newspaper Preservation Act	3
Proceedings Below	5
REASONS FOR GRANTING THE PETITION	7
Commercial Competition And Freedom Of The Press	7
The Proposed JOA Would Violate The Sherman Act, In The Absence Of An Exemption	8
Exemptions From The Antitrust Laws Must Be Narrowly Construed	9
Where Qualified Buyers Who Seek To Continue The Independent Operation Of The Newspaper Are Available, And The Owner Has Prevented The Exploration Of That Alternative By Rebuffing All Inquiries With The Statement That The Newspaper Is "Not For Sale," The Applicants Have Failed To Sustain Their Burden Of Proving That Competition-Preserving Alternatives To A JOA Are Unavailable	9
A Newspaper Cannot Be Deemed "In Probable Danger Of Financial Failure" When It Will Continue Independent Operation If An Exemption Is Denied	16
The Required Finding That Approval Of The Proposed JOA Would "Effectuate The Policy And Purpose" Of The Act Cannot Be Made Where The Editorial Voices Of Smaller Competing Newspapers Would Be Impaired, And Where The Terms Of The Proposed Arrangement Are Unnecessarily Anticompetitive	20
The Act Is Unconstitutional Under The First Amendment As Applied Herein	24

Table of Contents Continued

Page

The Licensing Provision Of The Statute Is Unconstitutional On Its Face Because Of Its Vague And Overbroad Delegation Of Power In An Area Affecting First Amendment Rights 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES: Page

Allied Chemical & Alkali Workers v. *P.P.G. Co.*, 404 U.S. 157 (1971) 12

Aptheker v. *Secretary of State*, 378 U.S. 500 (1964) ... 29

Associated Press v. *United States*, 326 U.S. 1 (1945) . 7

Baggett v. *Bullitt*, 377 U.S. 360 (1964) 29

Buckley v. *Valeo*, 424 U.S. 1 (1976) 27

Cantwell v. *Connecticut*, 310 U.S. 296 (1940) 29

Carnation Co. v. *Pacific Westbound Conference*, 383 U.S. 213 (1966) 9

Citizen Publishing Co. v. *United States*, 394 U.S. 131 (1969) 3-4, 16

Farmers Co-Operative Co. v. *NLRB*, 208 F.2d 296 (8th Cir. 1953) 12

FMC v. *Seatrain Lines, Inc.*, 411 U.S. 726 (1973) 9

Grosjean v. *American Press Co.*, 297 U.S. 233 (1936) . 26

Group Life & Health Ins. Co. v. *Royal Drug Co.*, 440 U.S. 205 (1979) 9

Kelly v. *Railroad Retirement Board*, 625 F.2d 486 (3rd Cir. 1980) 12

Kunz v. *New York*, 340 U.S. 290 (1951) 29

Los Angeles Memorial Coliseum Commission v. *National Football League*, 468 F. Supp. 154 (D.C. Cal. 1979) 21

Louisiana v. *NAACP*, 366 U.S. 293 (1961) 27

Lovell v. *Griffin*, 303 U.S. 444 (1938) 26, 29

Maryland and Virginia Milk Producers Ass'n v. *United States*, 362 U.S. 458 (1960) 23

Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974) 27

Mills v. *Alabama*, 384 U.S. 214 (1966) 27

Minneapolis Star and Tribune Co. v. *Minnesota Commissioner of Revenue*, 75 L.Ed. 2d 295 (1983) .. 24-26

National Association for the Advancement of Colored People v. *Alabama*, 357 U.S. 449 (1958) 27

Table of Authorities Continued

Page

National Constructors Ass'n v. *National Elec. Contractors Ass'n, Inc.*, 498 F. Supp. 510 (D.C. Md. 1980) 21

Northern Pacific Ry. v. *United States*, 356 U.S. 1 (1958) 3

Saia v. *New York*, 334 U.S. 558 (1948) 29

Schneider v. *Irvington*, 308 U.S. 147 (1939) 27

Sherbert v. *Verner*, 374 U.S. 398 (1963) 27

Shuttlesworth v. *Birmingham*, 394 U.S. 147 (1969) . 26, 29

Smith v. *Goguen*, 415 U.S. 566 (1974) 29

United States v. *McKesson & Robbins, Inc.*, 351 U.S. 305 (1956) 9

United States v. *Third National Bank*, 390 U.S. 171 (1968) 11

Woods Exploration & Producing Co. v. *Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) 9

AGENCY ADJUDICATIONS:

Recommended Decision of Administrative Law Judge Donald R. Moore in the matter of Application by the Cincinnati Enquirer, Inc., and The E.W. Scripps Company for Approval of a Joint Newspaper Operating Arrangement Pursuant to the Newspaper Preservation Act, 15 U.S.C. § 1801 *et seq.*, Department of Justice Docket No. 44-03-24-4 (1979) (hereinafter "*Recommended Decision of ALJ Moore*") 10-11

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. I 2-3, 25-30

STATUTES, RULES AND REGULATIONS:

Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* 2-3, 6, 12

Bank Merger Act, 12 U.S.C. § 1828 10-11

Table of Authorities Continued

Page

Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.* 2-4, 7-8, 23, 25, 30
Clayton Antitrust Act, 15 U.S.C. § 12 *et seq.* 21
Newspaper Preservation Act, 15 U.S.C. § 1801 *et seq.* 2-4, 17-18, 20, 27, 29-30
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1331 3
28 C.F.R. Part 48 ..... 2, 5, 13
Sup. Ct. R. 28.1 5

LEGISLATIVE MATERIALS:

H. Rep. No. 1193, 91st Cong., 2nd Sess. (1970) 22
S. Rep. No. 535, 91st Cong., 1st Sess. (1969) 10-11
Newspaper Preservation Act: Hearings on S. 1520 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on The Judiciary, 91st Cong., 1st Sess. (1969) 11, 22
116 *Cong Rec.* 1786 (1970) (Statement of Sen. Inouye) 10
116 *Cong Rec.* 1787 (1970) (Statement of Sen. Fong) .. 22
116 *Cong Rec.* 1795 (1970) (Statement of Sen. Goldwater) 10
116 *Cong Rec.* 2006 (1970) (Statement of Sen. Hruska) 10
116 *Cong Rec.* 23145 (1970) (Statement of Rep. Kastenmeier) 10
116 *Cong Rec.* 23146 (1970) (Statement of Rep. Kastenmeier) 11
116 *Cong Rec.* 23148 (1970) (Statement of Rep. McCulloch) 10

TREATISES:

B. Schwartz, *Administrative Law* (1976) 12
L. Tribe, *American Constitutional Law* (1978) 28-29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. ____

COMMITTEE FOR AN INDEPENDENT P-I, a corporation; PEOPLE OPPOSED TO A ONE-NEWSPAPER TOWN, an association; COMMITTEE FOR A FREE PRESS, an association; LONGVIEW PUBLISHING COMPANY, a corporation; ROBINSON COMMUNICATIONS, INC., a corporation; and NORTHSHORE PUBLISHING COMPANY, a corporation,

Petitioners,

v.

WILLIAM FRENCH SMITH, Attorney General of the United States; THE HEARST CORPORATION, a corporation; and SEATTLE TIMES COMPANY, a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray for a writ of certiorari to review a judgment entered by the United States Court of Appeals for the Ninth Circuit on April 21, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a)[1] is reported at 704 F.2d 467 (1983). The memorandum decision of the United

[1] The citation "App." refers to the appendix to this petition, which is separately printed. The citations "ER", "SER", and "DSER" refer

States District Court for the Western District of Washington is reproduced at App. 33a. The administrative order of the respondent Attorney General is reproduced at App. 53a.

JURISDICTION

The judgment in the Court of Appeals was entered on April 21, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The First Amendment to the Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2; the Newspaper Preservation Act, 15 U.S.C. § 1801 *et seq.*; the administrative regulations applicable to hearings conducted under the latter statute, 28 C.F.R. Part 48; and the section of the Administrative Procedure Act defining the scope of judicial review, 5 U.S.C. § 706, are set forth in the Appendix.

STATEMENT OF THE CASE

Summary

This is a case of first impression which presents issues of fundamental importance to the newspaper industry and the public under the First Amendment, the Sherman Act, and the Newspaper Preservation Act (hereinafter "the Act"). It is the first case of any description arising under the Act to reach a

---

to the excerpt of record, the supplemental excerpt of record, and the defendants' supplemental excerpt of record. The citation "CR" refers to the District Court Clerk's record. Citations to the administrative hearing transcript are to "Tr.", followed by the page. Exhibits received in evidence at the administrative hearing are cited as "Int. [for Intervenors'] Ex.", "Division [for Antitrust Division] Ex.", "Hearst Ex.", and "Times Ex.", followed by the exhibit number.

court of appeals, and the first involving the Attorney General's statutory power to license newspaper joint operating arrangements to be decided by the federal courts at any level.

The action is for judicial review of an administrative order granting two newspaper proprietors a virtually permanent exemption from the antitrust laws. The United States District Court for the Western District of Washington, in which jurisdiction was vested by the provisions of 28 U.S.C. § 1331 and 5 U.S.C. §§ 702 and 703, set aside as contrary to law an order of the Attorney General which would grant antitrust immunity to a proposed joint operating arrangement ("JOA") between Seattle's two metropolitan daily newspapers. The opinion of the Court of Appeals, filed on April 21, 1983, reversed that judgment and would award the extraordinary antitrust exemption.

Petitioners, plaintiffs and appellees in the courts below, assert that the executive branch is barred by the First Amendment, and by a correct construction of the Act, from allowing the requested exemption. This Court is respectfully requested to grant the petition for a writ of certiorari, reverse the judgment of the Court of Appeals, and reinstate the judgment of the District Court.

The Sherman Act And The Newspaper Preservation Act

The Sherman Act of 1890, 15 U.S.C. § 1 *et seq.* (App. 200a), prohibits combinations and conspiracies in restraint of trade and monopolization of any part of commerce. A statute of fundamental importance to the American legal system, the Sherman Act is a "comprehensive charter of economic liberty" whose goals include "providing an environment conducive to the preservation of our democratic political and social institutions." *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 4 (1958).

The Newspaper Preservation Act, 15 U.S.C. § 1801 *et seq.* (App. 201a) was passed in 1970 following this Court's decision in *Citizen Publishing Co.* v. *United States*, 394 U.S. 131

(1969). The Court in *Citizen Publishing* held that a JOA based upon price-fixing, fixed-formula profit pooling, and concerted division of markets by two newspaper competitors entailed Sherman Act § 1 violations which were "plain beyond peradventure" (*id.* at 135), and affirmed a district court order of divestiture. Congress thereafter provided for a limited antitrust exemption.

The Act distinguishes between pre-existing JOA's and those for which prospective approval is sought. The former are allowed an antitrust exemption if, at the time the arrangement was entered into, not more than one of the newspaper participants "was likely to remain or become a financially sound publication." 15 U.S.C. § 1803(a). No administrative action is involved with respect to pre-existing JOA's. A proposed new JOA must be submitted to the Attorney General, who may approve it, but is not required to do so, if he determines that "not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter." 15 U.S.C. § 1803(b). A "failing newspaper" is defined as one "which, regardless of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C. § 1802(5).

Before the present case arose there had been three JOA applications, relating to Anchorage, Chattanooga and Cincinnati, all smaller markets than Seattle. In Anchorage and Chattanooga the executive branch granted the applications without a hearing. In Anchorage, five years after the Attorney General determined that one of the two applicant papers was "failing," the JOA broke up over a disagreement; commercial competition then resumed and by the time of the hearing in the present case the formerly "failing" Anchorage newspaper had drawn nearly even with its competitor in circulation. (Tr. 361-5.) In Cincinnati a hearing was held and the JOA was then approved.

Federal court actions challenging the executive branch's approval of JOA's were filed regarding the Chattanooga and

Cincinnati applications, but were quickly settled. The case at bar thus involves the first judicial rulings on the merits concerning the Attorney General's prospective-licensing activity under the statute.

Proceedings Below

On March 27, 1981, respondents The Hearst Corporation ("Hearst") and Seattle Times Company ("Times") applied for approval of a proposed JOA between the Times and the Post-Intelligencer ("P-I"), for many years Seattle's only two metropolitan daily newspapers. (Hearst Ex. 1B-IV.)[2] The Attorney General ordered a hearing. He allowed petitioners to intervene as parties under 28 C.F.R. § 48.11, provided they did so through a single legal representative. (SER 12-13.) The petitioners include P-I employees, advertisers, readers, neighborhood and suburban newspaper publishers, and others who would be injured by implementation of the proposed JOA. (SER 12-13; ER 2-4).[3]

A three-and-one-half week hearing was held before an administrative law judge ("ALJ") in November, 1981. Following the hearing the Assistant Attorney General in Charge of the Antitrust Division ("AAG"), who is a party to the proceeding, 28 C.F.R. § 48.10(b), urged that the application be denied because it could not legally be granted. This marked the first

---

[2] Both Seattle metropolitan dailies are affiliated with national newspaper chains. Hearst, the sole owner of the P-I, operates newspapers, magazines, radio stations, television stations, and other business enterprises. The Times is owned by the Blethen Corporation and by Knight-Ridder Newspapers, Inc. (through an affiliate), a major newspaper chain proprietor.

[3] The following listing is provided in compliance with Rule 28.1 of this Court: Longview Publishing Company, one of the petitioners, owns stock in three non-wholly-owned subsidiaries, *i.e.*, The Production Company, St. Helens Publishing Company, and Cowlitz Cablevision, Inc. Valley Publishing Company, a plaintiff below, has been dissolved and is not a petitioner.

time that the Antitrust Division had opposed a JOA application on its merits. (App. 156a.) The ALJ issued a recommendation that the application be approved, including proposed findings and conclusions. (App. 62a.)

The Antitrust Division filed strong exceptions (App. 154a) to the recommendation, stating that "[t]he legal errors we perceive here are not only of significance to the Seattle application, but also set an erroneous precedent for future proceedings under the Act." (App. 157a). However, the Attorney General issued on June 15, 1982, an order granting the application, to become effective ten days thereafter. (App. 53a.)[4]

Petitioners filed the present judicial review action on June 16, 1982, seeking declaratory and injunctive relief against the Attorney General. (App. 185a.) Upon petitioners' motion for an order postponing the effective date of the Attorney General's order, as provided for by 5 U.S.C. § 705, the Court ordered a sixty-day postponement to facilitate judicial review. (App. 194a.)

All parties moved for summary judgment. On August 27, 1982, the Court issued its memorandum decision and order granting petitioners' motion for summary judgment on the basis that the administrative order had been issued contrary to law in that, although qualified prospective buyers had sought and were still seeking to acquire the P-I, Hearst had refused to explore new ownership as a means of assuring continued publication of the newspaper without resorting to concerted restraints of trade. (App. 33a.) Judgment setting aside the

---

[4] The Attorney General made no findings other than, or in addition to, those proposed by the ALJ. With the single exception of Finding 158 hereinafter noted, he merely adopted the ALJ's proposed findings and conclusions without changing them. (App. 55a-56a.) Accordingly, all references to the ALJ's findings or conclusions in this petition are to those of the Attorney General as well, since the two are identical (again, with the one exception noted).

administrative order was entered on August 30, 1982. (App. 52a.)

The respondents, defendants in the District Court, appealed, and petitioners cross-appealed as to additional grounds of alleged illegality which the District Court had not adopted. A three-judge panel of the Court of Appeals filed its opinion reversing the District Court on the finding of illegality, and affirming in the other respects, on April 21, 1983. (App. 1a.)

REASONS FOR GRANTING THE PETITION

Commercial Competition And Freedom Of The Press

The strong national policy favoring enforcement of the antitrust laws is especially important to a free and vigorous press. In *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945), holding the Sherman Act applicable to anticompetitive agreements entered into by newspaper publishers, the Court said (emphasis added):

> The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information *from diverse and antagonistic sources* is essential to the welfare of the public, that a free press is a condition of a free society.

Commercial competition is vital to editorial quality and diversity. If the proposed JOA at bar were allowed, the two Seattle dailies would cease to be "diverse and antagonistic sources" and the P-I would become a commercial appendage to its dominant partner.[5] The P-I's editorial voice would be

---

[5] The proposed arrangement is for fifty years with automatic ten-year renewals. (Hearst Ex. 1; SER 80-82.) It contains no provision for termination unless the venture proves unprofitable for three successive years, and thus amounts to a practically irreversible combination; the concerted market restraint could continue for decades

severely weakened through loss of its Sunday edition, loss of quality employees, loss of the commercial impetus to excel, and subjection to a restrictive "newshole" (ratio of news to advertising) formula. (Hearst Ex. 1; SER 46-48, 241, Tr. 3446-7.) At the same time, the proposed JOA would award the applicants concerted power over the market to the public's detriment. (App. 183a.)

The Proposed JOA Would Violate The Sherman Act, In The Absence Of An Exemption

The proposed JOA at issue would entail multiple *per se* violations of the Sherman Act §§ 1 and 2. It calls for the joint fixing of advertising rates (price-fixing), the joint fixing of circulation rates (price-fixing), the joint determination of areas of circulation (allocation of markets), a division of editorial times with each party refraining from publishing during the other's hours of publication (allocation of markets), the withdrawal of one competitor's Sunday newspaper (allocation of markets), fixed-formula profit-pooling, and a total cessation of commercial competition between the only two metropolitan dailies in Seattle (monopolization). Such conduct would ordinarily result in a felony indictment or a government civil action. "In this proceeding" as the AAG has pointed out, "the

---

after the conditions originally claimed to justify it had ceased to exist. (*Id.*) It places commercial control of both newspapers in the hands of the Times, including rate-setting, establishment of combination rates, circulation rates and areas, advertising sales, establishment of zoned editions, promotion, and production. (*Id.*) It eliminates all commercial competition between the two papers and permits them to act concertedly through a management committee controlled by the Times. (*Id.*) It allocates markets by eliminating the P-I's Sunday edition, withdrawing the Times' Monday through Friday morning editions, and establishing exclusive publication hours for each participant. (*Id.*) And it allocates to each party a flat percentage of total combined earnings (approximately one-third to Hearst and two-thirds to Times), regardless of their individual circulations or advertising sales. (*Id.*)

Attorney General is being asked to approve not merely a limited, technical departure from the usual norms of business behavior, but a permanent license to engage in what could otherwise be seri s antitrust violations. . . ." (App. 182a.)

Exemptions From The Antitrust Laws Must Be Narrowly Construed

This Court has "long recognized that the antitrust laws represent a fundamental national economic policy." *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 218 (1966). The requirement that exemptions from the Sherman Act be narrowly construed applies to express statutory exemptions. *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956); *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 231 (1979); *Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 438 F.2d 1286, 1302 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

Where Qualified Buyers Who Seek To Continue The Independent Operation Of The Newspaper Are Available, And The Owner Has Prevented The Exploration Of That Alternative By Rebuffing All Inquiries With The Statement That The Newspaper Is "Not For Sale," The Applicants Have Failed To Sustain Their Burden Of Proving That Competition-Preserving Alternatives To A JOA Are Unavailable

This case presents the spectacle of one of the nation's largest media proprietors fending off would-be buyers of its newspaper with one hand while holding out the other to the federal government for an antitrust exemption. The correct rule is the one adopted by the District Court: Where the record shows the availability of qualified buyers who seek to continue the newspaper's independent operation, the applicant cannot deliberately frustrate that alternative and still obtain an exemption.

The legislative history makes clear that Congress intended the exemption to be a last resort to prevent the actual closure

of a newspaper. "[T]he granting of an exemption from the antitrust law, in any industry, must be carefully limited. Caution is particularly necessary when the exemption applies to the news media." 116 *Cong. Rec.* 1795 (1970), statement of Senator Goldwater. The procedure for examining proposed future JOA's was meant to "act as a brake upon other newspapers which might otherwise prematurely turn to joint operating arrangements, without testing other means of maintaining full commercial and editorial competition." 116 *Cong. Rec.* 2006 (1970), statement of Senator Hruska. "[T]he future availability of the antitrust exemption for newspapers in other cities should be limited only to those situations where a joint newspaper operating arrangement is demonstrably essential to prevent a newspaper failure . . ." 116 *Cong. Rec.* 23148 (1970), statement of Representative McCulloch. The only JOA's contemplated were those "necessary to save one or the other or both [newspapers] from going out of business." S. Rep. No. 535, 91st Cong., 1st Sess. (1969), at 15. An exemption would be considered only where necessary to prevent an actual withdrawal from publication — where "the choice plainly narrows down to the survival" of the applicant newspaper. 116 *Cong. Rec.* 1795 (1970), statement of Senator Goldwater.

As under the Bank Merger Act, 12 U.S.C. § 1828, to which Congress referred in enacting the statute at bar, a refusal to explore the alternative of a sale to new ownership precludes the granting of an antitrust exemption. Congress intended that a newspaper being sought by well-qualified and well-financed buyers would not be deemed "in probable danger of financial failure." According to the Senate Report, when "a newspaper is failing . . . it is almost impossible to find an outside buyer." S. Rep. No. 535, 91st Cong., 1st Sess. 4 (1969). Similarly, Senator Inouye stated that "[T]here is no market for independent ownership of a failing paper. . . ." 116 *Cong. Rec.* 1786 (1970). *See also* 116 *Cong. Rec.* 23145 (1970) (remarks of Rep. Kastenmeier).[5]

[5] Accordingly, in the Cincinnati JOA proceeding, Administrative Law Judge Moore concluded: "In passing the Newspaper Preserva-

Congress also plainly intended that the standards applicable under the Bank Merger Act, 12 U.S.C. § 1828, as enunciated by this Court in the then-recent case of *United States* v. *Third National Bank*, 390 U.S. 171 (1968), should apply. *See* Hearings on S. 1520 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 7-8 (1969); S. Rep. No. 535, 91st Cong., 1st Sess. 2 (1969); 116 *Cong. Rec.* 23146 (1970). Those standards require that a merger be disapproved unless the proponents "reliably establish the unavailability of alternative solutions." *Third National Bank*, *supra*, 390 U.S. at 190.

In the present case the ALJ made detailed findings that Hearst had insisted at all times that the P-I is not for sale (Finding 156, App. 135a); that a series of responsible would-be buyers had approached Hearst seeking to purchase the newspaper before and even during the hearing, but had been told that it was not for sale (Finding 157, App. 135a-136a);[7] and that "considering that the Post-Intelligencer is not, and has not been for sale, and that all inquiries regarding possible purchase have been rebuffed by The Hearst Corporation with statements to that effect, and that responsible prospective purchas-

---

tion Act, Congress assumed that by the time a newspaper had declined to the point at which it would be eligible to enter into a joint operating arrangement, alternative purchasers would not be available." *Recommended Decision of ALJ Moore* at 126.

[7] The would-be buyers shown to be available at the time of the hearing were John E. Cunningham, a Seattle businessman and former Congressman; Donald Snellman, a Seattle industrialist; and Rupert Murdoch, an international newspaper publisher. *See* App. 135a-136a and Division Ex. 56, Int. Ex. 355, Tr. 4203, and Tr. 2222-24. Other would-be buyers who had been rebuffed by Hearst in the recent past were Karl Eller, whose company owned several newspapers including the Oakland Tribune and the Cincinnati Inquirer; Philip Bailey, a Seattle businessman and weekly newspaper publisher; and Joe Albritton, a newspaper proprietor. *See* App. 135a-136a and Tr. 2767, 2773 and 2787; Int. Ex. 329A; Tr. 2221-22, 2781-82; Int. Ex. 34; and Tr. 2833-37.

ers nevertheless continue to appear and express an interest in buying the Post-Intelligencer, it must be concluded that the Post-Intelligencer could in all probability be sold at fair market value to a person or firm who could, and would, continue it in operation as an independent metropolitan daily." (Finding 158, App. 136a.)*

Two basic errors of law were committed by the Attorney General in dealing with this issue. First, he assumed that Congress did not intend the standards of the Bank Merger Act to be applicable: "There is nothing in the legislative history of the Newspaper Preservation Act as a whole to suggest that Congress intended that the standards used for judging bank mergers were to be applied to newspapers." (App. 142a.) Second, he assumed there was no requirement that a sale to new ownership be considered as a competition-preserving alternative: The applicant "is not required . . . to demonstrate that [the newspaper] cannot be sold to a buyer willing and able to continue it in operation as an independent editorial voice. . . ." (App. 140a.)

---

* The Attorney General adopted Findings 156 and 157 but refused to adopt Finding 158. (App. 55a-56a.) The District Court ruled that his rejection of Finding 158 was unsupportable under either the "arbitrary and capricious" or "substantial evidence" standard of judicial review. (App. 37a-38a.) The Court of Appeals ruled that the Attorney General was not required by the evidence to adopt Finding 158, but that the presence or absence of that finding was not decisive in any event. (App. 13a.) As shown in this petition, Findings 156 and 157 are sufficient in themselves to require denial of the application, although Finding 158 was also compelled by the evidence. The correct standard of review of agency findings is that where the evidence as a whole shows them to be unreasonable the court will reverse them. *E.g., Farmers Co-Operative Co.* v. *NLRB*, 208 F.2d 296, 304 (8th Cir. 1953); *Kelly* v. *Railroad Retirement Board*, 625 F.2d 486, 495 (3rd Cir. 1980); B. Schwartz, *Administrative Law* 663 (1976). The rules of law to be applied are for the courts to decide and enforce. 5 U.S.C. § 706; *Allied Chemical & Alkali Workers* v. *P.P.G. Co.*, 404 U.S. 157, 182 (1971).

The District Court correctly overturned the challenged order on both points. (App. 33a.) The Court of Appeals has reversed on the basis that, in its view, Hearst's rejection of the sale alternative was excusable because there was insufficient proof that a new owner would succeed, stating:

> In the absence of a showing that there is a likelihood new management would succeed, Hearst's failure to consider purchase inquiries lost importance. We therefore reverse the district court's holding.

(App. 21a.)

This disposition of the matter is in error. It would allow proprietors to gain antitrust exemptions for newspapers which could be operated successfully by others simply by rejecting the available sale alternative out of hand and thus causing their own weak performance, rather than the newspaper's true potential, to become the measure of the publication's future prospects.

New management cannot adequately be consulted, nor its prospects assessed, unless it is given a motive to pursue the matter through an expressed or required willingness to consider a sale. The District Court correctly held that where the owner flatly rebuffs all would-be buyers by telling them the newspaper is not for sale, "[t]here has been no fair opportunity for prospective buyers to prepare and present their plans to make the [newspaper] profitable." (App. 46a.)

For the same reason the Circuit Court's reliance upon a statement by the ALJ that "although some of the witnesses in this proceeding were critical of the handling of the Post-Intelligencer, the evidence does not establish that new management would be any more successful than Hearst and current management of the Post-Intelligencer in returning it to profitability" is misplaced. First, the statement erroneously reverses the burden of proof which is placed upon the applicants by 28 C.F.R. § 48.10(a)(4). Second, it ignores the erroneous exclusion by the ALJ of the proffered testimony of Donald Snellman, a Seattle industrialist who made his desire to buy

the P-I known during the last week of the hearing. (Tr. 4190, 4203.)[9] Third, it is totally unrealistic because it overlooks the fact that business people will not come forward with specific offers, or with plans to make an enterprise succeed, when they are told it would be futile to do so. Hearst effectively told the would-be buyers that even if they could succeed it would not sell to them. As stated by the AAG, "Hearst's unwillingness to enter into serious negotiations or cooperate with potential buyers of the P-I made it difficult for them to formulate concrete proposals for purchase and future operation of the paper. The fact that qualified purchasers nonetheless continued to come forward is strong and unrebutted evidence of the P-I's saleability." (App. 179a.)

Time after time, the record shows, new ownership has brought success to struggling newspapers. An especially striking example, and one which shows the folly of administrative findings of "probable danger of financial failure" before alternatives have been explored, is the recent experience in Anchorage, Alaska, a much smaller market than Seattle.[10] Other examples include the San Antonio News and Express, Detroit Free Press, Rocky Mountain News, Chicago Sun-

---

[9] The ALJ stated that he was "approaching it from the standpoint that I do not read the Newspaper Preservation Act as putting any requirement on any papers seeking a JOA that that paper offer itself up for sale. . . ." (Tr. 4190.)

[10] In 1974 the Anchorage News was in a position much inferior to the current position of the P-I. Its circulation share of field was about 25% against the Anchorage Time's 75%; the two proprietors applied for a JOA; and the application was granted pursuant to an Attorney General's finding that the News was in "probable danger of financial failure." (Tr. 361-362.) Following that, the Times operated the joint agency which put out both papers. (Tr. 363.) Then the JOA partners had a falling-out and a lawsuit which was settled by dissolution of the JOA in 1978. (*Id.*) The News had lost its Sunday edition in the JOA, and by 1978 its market share had shrunk to about 20%. (*Id.*) By the standards promulgated by Hearst's expert, and later adopted by the Court of Appeals herein, the News was past the point of "probable

Times, Sacramento Union, St. Petersburg Independent, New York Times, and Newark Ledger. (Tr. 354-58, SER 203-05.)

The new ownership alternative is especially compelling here in light of Hearst's nationwide record. According to the company's own expert, virtually every metropolitan daily in the chain which faces competition has declined to the point of "probable danger of financial failure." (Tr. 340, 354-8.) The Hearst newspapers thus described as "failing" operate in markets which are clearly able to support competition.[11]

The correct rule is that where qualified buyers come forward, the applicant-owner must be willing to consider a sale so as to permit the new ownership alternative to be explored. If the owner refuses to do that—as Hearst did here—the applicants' burden of negating the availability of competition-preserving alternatives cannot be met. That is the District Court's rule in the present case, and it fits the legislative intent.[12] Congress did not intend to permit an owner

---

danger of financial failure." (Tr. 361-65.) In early 1979, however, a new owner bought a controlling interest in the News, acquired presses and a building, and resumed commercial competition with the Times. The News's circulation nearly tripled in one year. (Tr. 364.) By 1981 the News had risen in just over two years from a one-to-five circulation ratio to a three-to-four ratio and was competing vigorously. (Tr. 365.)

[11] Petitioners made a timely request that the Court of Appeals take judicial notice that in December, 1982, a year after the administrative hearing, Hearst sold its daily newspaper in Boston to News America Publishing Company. The court declined the request solely because it considered the fact "not relevant." (App. 22a, n.10.) This too was error. The Boston sale is relevant because it illustrates that the future of a Hearst daily claimed by the management to be "failing" (Tr. 333, 339), where the competitor rejects a JOA, is not closure but a sale to vigorous new ownership.

[12] The rule differs from the "failing company doctrine," which applies to mergers outside the newspaper field. The latter requires proof that the failing company is on the brink of liquidation, that is

deliberately to block all attempts by other entrepreneurs to acquire its newspaper, and then claim the enterprise was "failing" while others who recognized its value and advantages were still attempting to purchase it.

A Newspaper Cannot Be Deemed "In Probable Danger Of Financial Failure" When It Will Continue Independent Operation If An Exemption Is Denied

Where the evidence fails to show that the two applicant newspapers will do anything other than continue publishing competitively without an antitrust exemption—*i.e.*, there is no showing of a probable future closure—the burden of proving the need for an exemption has not been met and the application must be denied.

The Court of Appeals has erroneously failed to apply this rule. It has used an artificial definition of "probable danger of financial failure" and has incorrectly assumed that a JOA could be allowed even where both applicant newspapers would continue publishing without one. It has further sanctioned the erroneous exclusion of evidence, offered by the Antitrust Division, to prove that Hearst in fact obtains net financial benefits from operating the P-I.

The Attorney General conceded in the District Court that he had "made no finding that the P-I was faced with actual closure." (CR 63, p. 6, lines 7-8.) The ALJ disclaimed any finding that the P-I is in practical danger of closing, stating that "it is not clear what will be the fate of the Post-Intelligencer if the joint operating arrangement is disapproved." (App. 140a.)

The applicants insisted that they were not required to show any likelihood that the P-I will cease publishing without a JOA. The ALJ adopted that view, saying that the Act "does not

---

prospects for reorganization are dim or nonexistent, and that it has affirmatively sought other buyers without success, none of which is required by the District Court's rule herein. *Citizen Publishing Co. v. United States*, 394 U.S. 131, 138 (1969).

require Hearst to make this showing." (App. 140a.) Although the Antitrust Division vigorously disagreed and presented legislative history showing that proof of a probable closure was essential (App. 157a-160a), the Attorney General adopted the ALJ's legal conclusion.

The legislative history shows that the statutory definition of a "failing newspaper" as one "in probable danger of financial failure" (15 U.S.C. §§ 1802(5), 1803(b)) requires proof that an actual closure and the loss of an editorial voice are probable. *See* the statements of Congressional intent quoted *supra*, pp. 10-11. It is not sufficient that past accounting losses be shown or future ones predicted.

The Court of Appeals has recognized that Hearst or a successor will continue to operate the P-I competitively if the exemption is denied, stating: "For purposes of this issue, we accept the Committee's assertion that Hearst never considered closing the P-I, even should the joint operating agreement not be allowed." (App. 23a.)

The court below has also found that "it is beyond the question that the purpose of the Act is to prevent the *closure* of the ailing newspaper . . . We adhere to our belief that Congress intended the phrase 'probable danger of failure' to mean a probability that the paper would be closed and an editorial voice lost." (App. 23a-24a.)

However, the opinion below has then gone on to conclude that the statutory phrase, "regardless of its ownership or affiliations," which precedes the words "probable danger of financial failure" in 15 U.S.C. § 1802(5), permits the Seattle exemption. The Court's theory is that "without the backing of Hearst, [the P-I] would probably close" (App. 23a.) Reliance is placed upon legislative history indicating that "the presence or absence of financial support from other newspaper business activities in other cities or from other financial activities of the owners" are not to be considered. (App. 24a-25a.)

This approach is in error for the following reasons:

First, it is plain from the legislative history that the phrase "regardless of ownership or affiliations" in 15 U.S.C. § 1802(5) means only that a "deep pocket" parent should not be required to deplete its financial assets before seeking a JOA; it does *not* mean that an owner who is operating the paper profitably or without actual cost to itself, and who will not close it, could become eligible. (App. 161a-163a.)

Second, there is no "backing" or "financial support" involved where the newspaper's owner has actually been gaining net benefits from its operation. That is the case here, as shown by the Antitrust Division's accounting evidence which the Attorney General erroneously refused to receive or consider. With incremental analysis, as explained by the AAG, "[t]he businessman simply asks himself whether his overall business would, on balance, gain or lose if the unit or operation were shut down." (App. 161a.) The Division's highly-qualified accounting expert testified in an offer of proof that Hearst in fact has been benefitting financially from owning and operating the P-I. (App. 171a-177a.) Accordingly, there is no real prospect of a closure. The ALJ recognized that according to this evidence "the Post-Intelligencer during the years 1976 through 1980 returned a net benefit to its owner, Hearst." (App. 146a). Nevertheless he rejected the offer of proof, and refused to consider incremental analysis, because the statutory definition of a "failing newspaper" includes the phrase "regardless of its ownership or affiliations." 15 U.S.C. § 1802(5).

There is accordingly no finding in the record as to whether Hearst has been obtaining net financial benefits from the P-I.

The ruling excluding the Antitrust Division's accounting evidence was in error because it ignored the central issue of whether the newspaper would continue publishing without a JOA. As the AAG pointed out, "Congress did not intend to ignore that issue in favor of a wholly artificial and speculative inquiry into the prospects of an independent P-I that does not exist." (App. 163a.)

The reasons why Hearst has never considered closing the P-I (SER 492-94; Tr. 1456, 1538, 2476, 1724, 2198-99) are clear. The owner has realized net benefits from the newspaper when realistic accounting methods are applied, *supra*. The newspaper enjoys the morning position (Tr. 271-72, 378-79) in an exceptionally fast-growing and desirable market (App. 79a-80a, ER 39-40) which is fully capable of sustaining daily newspaper competition (SER 302-6). Hearst itself saw the P-I as close to profitability in the years immediately preceding the JOA application. It described the newspaper as holding a "unique position in the Hearst organization" and as the likeliest metropolitan daily to attain early commercial success. (Int. Ex. 155C; Tr. 1454-55.) In 1978 it noted that "[a]ll vital signs are improving for the unit," and in 1979 that the Seattle "market is exceptionally strong." (Int. Exs. 42, 55.) Hearst's newspaper division chief expected a 1980 P-I profit unless a general recession occurred. (Int. Ex. 67.) Improvements in management which the uncontradicted evidence shows were urgently requested for years by Hearst's local executives, but rejected by the New York office, have succeeded in other cities but remain untried at the P-I. (TR. 361-65, 3554-5, SER 100-27.)[13] Qualified would-be buyers continue to appear, and Hearst can sell the P-I for fair market value whenever it chooses to do so, *supra*.

The AAG has aptly pointed out that the slack definition of the phrase "probable danger of financial failure" subsequently adopted by the Court of Appeals "is highly artificial, requiring

---

[13] The Court of Appeals has erred in this regard by confining the opponents of a proposed JOA to showing "unreasonable" management practices. (App. 21a.) While there was testimony from several of Hearst's own executives and editors that it had mismanaged the P-I (SER 89-146, 326-28), and Hearst's expert testified that virtually every competitive-market daily in the company's chain has fallen into "probable danger of financial failure" (Tr. 340, 354-8), it should not be necessary to litigate whether management was "unreasonable." It is enough that *different* management—without characterizing what has gone before—should be tried.

only a showing of past accounting losses on financial statements, without regard to the actual, practical danger of economic failure and the loss of an editorial voice. . . ." (App. 157a-158a.)

The net result of the Ninth Circuit's interpretation of the statutory phrase is to allow a federally-licensed combination in restraint of trade to be imposed on a market although both applicant newspapers would continue publishing without one, and although both operate with net financial benefits to their owners. Such an interpretation should not be allowed to stand.

The Required Finding That Approval Of The Proposed JOA Would "Effectuate The Policy And Purpose" Of The Act Cannot Be Made Where The Editorial Voices Of Smaller Competing Newspapers Would Be Impaired, And Where The Terms Of The Proposed Arrangement Are Unnecessarily Anticompetitive

The second part of the two-part test set out in 15 U.S.C. § 1803(b) provides that before approval of a JOA can be granted "the Attorney General shall determine . . . that approval of such arrangement would effectuate the policy and purpose of this chapter." That requirement cannot be met where, as here, implementation of the proposed JOA would impair or silence the editorial voices of smaller newspapers in the market. The statutory purpose is "to preserve the publication of newspapers"—not to silence them. 15 U.S.C. § 1801.

The Court of Appeals, following the Attorney General, has held that even if the proposed federal license to combine in restraint of trade would have the effect of eliminating smaller newspapers' voices, that fact is irrelevant. The court below has asked: "[M]ust the Attorney General determine that the proposed JOA . . . would not impair the editorial voices of smaller newspapers in the affected market?" (App. 7a.) Its negative answer is in error.

The correct rule is that the application must be denied where the probable effect of allowing an exemption would be to harm

other newspapers to the point where their editorial voices would be substantially diminished or silenced. Evidence should be taken and findings made on that issue.

Although the Attorney General has declined to make findings on the subject, the record here shows unmistakably that neighborhood and suburban newspapers will be harmed. The use of combination advertising rates, price-fixing, market allocation, formula profit-pooling, and other practices which would be allowed to the two largest competitors in the market, while being denied to all others, would substantially impair the editorial voices of the smaller newspapers. (SER 48-59.) Two of the targeted proprietors testified in detail to the harm the JOA will inflict upon them (Tr. 3317-84, 3966-92). The applicants admitted that one purpose of their proposed arrangement is to gain competitive advantages over the smaller papers. (Tr. 385-93, 1468.)

The injuries which the proposed JOA would inflict on the smaller papers have been proved by evidence which amply meets the Clayton Act requirement for a private party to obtain an injunction—*i.e.*, a showing of "significant threat of injury from an impending violation of the antitrust laws." *E.g.*, *Los Angeles Memorial Coliseum Commission* v. *National Football League*, 468 F. Supp. 154 (D.C. Cal. 1979); *National Constructors Ass'n.* v. *National Elec. Contractors Ass'n, Inc.*, 498 F. Supp. 510 (D.C. Md. 1980).

The Attorney General adopted the ALJ's statement that "it is possible that some suburban newspapers may be put at a disadvantage by the joint operating arrangement . . ." (App. 151a.) But he made no formal findings on the subject because he believed, following the ALJ, that

> . . . The effects of the joint operating arrangement between the Post-Intelligencer and the Seattle Times, if any, on competing media are not relevant to the determination of whether that arrangement should be approved under the terms of the Newspaper Preservation Act.

(App. 145a.)

The Court of Appeals, similarly, has assumed that smaller editorial voices would be injured but that there is no need to determine whether the injury would be serious or fatal. (App. 25a-28a.)

Congress could not constitutionally have intended such a draconian result. Its expressed goal was to promote a *diversity* of editorial voices. As stated by Senator Fong, "we must foster editorial competition and diversity as much as possible in every community." 116 *Cong. Rec.* 1787 (1970). That goal would be defeated where a proposed JOA would have unduly destructive effects upon smaller newspapers.[14]

Congress intended that probable effects upon competing newspapers should be considered. *See, e.g., Hearings on S. 1520 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 91st. Cong., 1st Sess. 4-5 (1969). Nothing in the legislative history supports the view of the court below that harm to competing editorial voices, no matter how grievous, is excluded by law from the factors to be considered by the Attorney General.[15]

---

[14] It is no answer to say, as the court below does, that "other newspapers in the Seattle area, large or small, may participate in a joint operating agreement if they qualify." (App. 29a.) In reality they cannot do so because they have no potential JOA partners. The government in any event cannot lawfully push them away from competition and toward combination. Nor is it an answer to say that commercial victims of the combination would be able to sue on the basis of the antitrust rules governing a single actor, since the government here purports to license *collusive* conduct which in itself would be harmful. (CR 61, App. H, p. IV-10-12; SER 71-73.)

[15] The Ninth Circuit's quotation from a House Report that "[a]lthough commercial competition may have been affected to some extent by these arrangements, they have achieved the more important objective of preserving separate editorial voices," H. Rep. No. 1193 at 3549, is inapposite. The context makes clear that the Report was referring to commercial competition *among the parties* to joint operating arrangements, not to adverse effects upon competition by third party newspapers.

The Court of Appeals has also asked: "[M]ust the Attorney General determine that the proposed JOA is not unnecessarily anticompetitive . . .?" Its negative answer again is in error.

If the proposed arrangement is *unnecessarily* destructive of competition between the two applicants, it should clearly be disapproved. Antitrust exemptions must be narrowly construed, *supra*. There exists no antitrust exemption in which the exempted parties pass through a golden door following which the anticompetitive sweep of their arrangements is left to them.[16] The Attorney General's refusal to consider whether the terms of the proposed arrangement at bar were needlessly anticompetitive was in error.

In the severity, length, and comprehensiveness of its Sherman Act § 1 and § 2 violations, the proposed Seattle JOA goes far beyond anything which could conceivably be necessary to assure the P-I's continued publication. Its duration would be far longer than that of any other arrangement yet submitted for approval (50 years plus extensions, as against 20 and 30 years for Chattanooga and Cincinnati). It would amount to a virtually permanent combination. Perpetual antitrust immunity would be provided regardless of whether the conditions originally claimed to support it (*i.e.*, a "failing" P-I) ceased to exist. (Hearst Ex. 1; SER 80-82.) The proposed JOA contains an editorial restraint on the P-I (a restrictive "newshole" formula) as well as commercial restraints. (SER 39-45.) As stated by the Newspaper Guild local in its brief opposing the application (SER 241):

> The structure of the JOA assures that fifty years hence the P-I will be in no better condition to compete as an independent entity than it is now. In fact, this particular

---

[16] For example, agricultural cooperatives exempted by the Capper-Volstead Act run afoul of the Sherman Act if their concerted actions exceed the legitimate objects of the exemption. *Maryland and Virginia Milk Producers Ass'n. v. United States*, 362 U.S. 458 (1960).

JOA is unprecedented in its scope among the applications considered under the Act.

The argument that Congress left it to the proprietors to draft whatever they choose and have it automatically approved by the Attorney General once the "failing" condition of one applicant was demonstrated, accepted by the court below, could not be more starkly at odds with long-standing antitrust policy. Such a rule would invite proprietors to write the most anticompetitive agreements possible in making applications under the Act.

The Act Is Unconstitutional Under The First Amendment As Applied Herein

The Court of Appeals has assumed that the federal government can grant two metropolitan dailies an exemption from generally-applicable economic regulation even where the result is to injure or silence the voices of smaller newspapers, published in the same market, which must still carry the regulatory burden. That holding is in error because the First Amendment prohibits disparate economic regulation which favors some newspapers over others. *Minneapolis Star and Tribune Co.* v. *Minnesota Commissioner of Revenue*, 75 L.Ed.2d 295 (1983).

The Amendment is not limited, as the court below would have it, to proscribing direct restraints on the content of speech. The Ninth Circuit's conclusion that "we do not find first amendment rights implicated" (App. 29a) is plain error.

Seattle is not a two-newspaper market, but a multi-newspaper market. While the applicant metropolitan dailies are deeply entrenched, the editorial voices of the suburban and neighborhood newspapers have equal constitutional importance.

The record shows that smaller papers would be injured or silenced by the proposed JOA, *supra*. In the view of the court below, that fact is irrelevant because Congress was entitled to

tip the scales for the applicants and against the others. The opinion states (App. 28a):

> Congress recognized that the approval of JOA may have anticompetitive ramifications. This was a national policy choice Congress was free to make . . .
>
> * * *
>
> At most, the Act *may* affect the number of "readers" a newspaper has. But that the Act may have such an effect is no different, in our view, than any other economic regulation of the newspaper industry.

In so ruling, the Court of Appeals has failed to recognize that the "economic regulation" imposed on the Seattle market by the challenged administrative order would be *unequal* among newspapers; that Congress is not free to burden some newspapers with "anticompetitive ramifications" resulting from preferential treatment of others; and that discriminatory governmental intervention in the area of the press which "may affect the number of 'readers' a newspaper has" is prohibited. The opinion relies on the notion that "[w]hat Congress has passed, it may repeal." (App. 29a.) But Congress has not repealed the Sherman Act. Nor has it decreed that the Sherman Act will not be applied to newspapers. What is attempted here is an administrative exemption of the two largest Seattle newspapers from the Sherman Act so as to allow them to combine in restraint of trade (price-fixing, allocation of markets, and the like), while forbidding that conduct to all others in the market, to their injury. That cannot constitutionally be done.

This Court held in *Minneapolis Star and Tribune Co.* v. *Minnesota Commissioner of Revenue*, *supra*, 75 L.Ed.2d 295 (1983), that government cannot employ economic measures which treat one group of newspapers more favorably than another because such diverse treatment jeopardizes the First

Amendment rights of the disfavored newspapers.[17] A Minnesota use tax on paper and ink consumed in newspaper production was held unconstitutional both because the tax singled out the press for economic regulation different from that imposed upon businesses generally, and because its burden fell differently on different newspapers. The Court stated, 75 L.Ed.2d at 308-9:

> Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers. The effect of the $100,000 exemption enacted in 1974 is that only a handful of publishers pay any tax at all, and even fewer pay any significant amount of tax.

The economic burden of having to comply with the antitrust laws is as real as the burden of paying a tax. Just as Congress could not selectively free the dominant dailies from a general tax, it cannot free them from antitrust regulation in a market inhabited by other newspapers which continue to bear the burden of that regulation.

The *Minnesota Star* decision is but the latest of many in which the Court has made clear that the First Amendment prohibits regulations having the *effect* of chilling speech, or of favoring some speakers over others. *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969); *Lovell* v. *Griffin*, 303 U.S. 444 (1938); *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936).[18] The government's intent is not controlling. In fact, as the

---

[17] The Court of Appeals has failed to mention the *Minneapolis Star* decision although petitioners timely brought it to the panel's attention by a letter sent on April 1, 1983, three days after the decision was announced. The opinion below was filed nearly three weeks later.

[18] The content-neutral license tax imposed upon smaller newspapers, but not larger ones, in *Grosjean* "was held invalid because of its direct tendency to restrict circulation." *Lovell* v. *Griffin*, *supra*, 303 U.S. at 452. While the Court in *Grosjean* noted the political motivation of the measure, the outcome today would be the same without it because the prohibited effect upon freedom of the press would be the same. *See Minnesota Star*, *supra*, 75 L. Ed. 2d 295 (1983).

Court stated in *NAACP* v. *Alabama*, 357 U.S. 449, 461-2 (1958),

> [t]he governmental action challenged may appear to be totally unrelated to protected liberties. Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the *consequence* of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment.

(Emphasis added.) *See also Louisiana* v. *NAACP*, 366 U.S. 293, 297 (1961) ("[R]egulatory measures . . . cannot be employed in purpose *or in effect* to stifle, penalize, or curb the exercise of First Amendment rights.") (Emphasis added).

It has long been the rule that economic impact can constitute a forbidden abridgement of First Amendment rights. *E.g.*, *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

In the area of the First Amendment, Congress does not have the freedom to choose that it possesses elsewhere. It cannot choose to foster two editorial voices downtown at the expense of a diversity of editorial voices throughout the metropolitan area. *Compare Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), and *Mills* v. *Alabama*, 384 U.S. 214 (1966), with *Schneider* v. *Irvington*, 308 U.S. 147 (1939).

The Licensing Provision Of The Statute Is Unconstitutional On Its Face Because Of Its Vague And Overbroad Delegation Of Power In An Area Affecting First Amendment Rights

An applicant by establishing "probable danger of financial failure" does not thereby gain entitlement to an exemption. The remaining question is whether the application would "effectuate the policy and purpose" of the Act. 15 U.S.C. § 1803(b). The vagueness of the latter phrase would allow the Attorney General unconstitutionally broad discretion to determine the fate of economically troubled newspapers.

The long-standing rule is that discretionary licensing power cannot be delegated to the executive branch in an area pro-

tected by the First Amendment. This Court "has consistently required the statutory delegation to provide narrowly drawn, reasonable and definite standards for the [administering] officials to follow . . .." L. Tribe, *American Constitutional Law* 732-33 (1978).

The respondent Attorney General claims that he exercises "enormously broad" discretion (SER 438), under the "effectuate the policy and purpose" language, in granting or denying newspaper antitrust exemptions. He maintains that Congress has given him uncontrolled discretion to *approve* JOA's, stating (CR 50 at 17, emphasis added):

> [The Attorney General's] determination that approving the proposed JOA would effectuate the policy and purpose of the Act is not judicially reviewable because *it is entirely a matter of discretionary policy and there is 'no law to apply.'*

The Attorney General further claims total discretion to *deny* JOA's (CR 50 at 17, emphasis added):

> Recognizing that situations might occur in which *it is not appropriate to save a failing newspaper*, Congress granted the Attorney General *discretion* to disapprove JOAs which do not effectuate the policy and purpose of the Act.

On appeal, the Attorney General has repeated that "after a newspaper meets the ["failing"] criterion established in the Act by Congress, the Attorney General has *discretion* to determine if approval of an arrangement will fulfill the policy and purpose of the Act," and that the "Attorney General does have authority to deny an application, in his *discretion*, if he believes that approval would not effectuate the policy and purpose of the Act." (AG Reply 10-11, 19 n.11; emphasis added.)

The Attorney General's reading of the statute points up its fatal vagueness. Nothing in the statute requires approval even if the illusory phrase "effectuate the policy and purpose of this chapter" is deemed satisfied.

Similarly overbroad licensing power has been struck down consistently by this Court. *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 150-51 (1969); *Lovell* v. *Griffin*, 303 U.S. 444 (1938); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Saia* v. *New York*, 334 U.S. 558, 562 (1948); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). The "void for vagueness" rule demands high specificity where the First Amendment is implicated. *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964); *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974); L. Tribe, *American Constitutional Law* 733 (1978).

The Court of Appeals has failed to apply the void-for-vagueness rule for two expressed reasons, both of which are in error. First, the opinion states that "we fail to see any clearly defined first amendment injury." (App. 29a.) That statement is untenable where the executive branch holds the delegated power to determine who may enjoy economic advantages in publishing and who may not. Second, the court asserts that "the Attorney General must base his approval of a proposed JOA on the requirements in the Act as we have interpreted them in this opinion." (App. 30a.) But the opinion deals with the "probable danger of financial failure" part of the two-part test; with regard to the "effectuate the policy and purpose of this chapter" part, it provides no content at all.[18] And the rule in any event is that the content of a speech-affecting statute which is void for vagueness cannot constitutionally be filled in by court decisions. *Smith* v. *Goguen*, *supra*, 415 U.S. 566, 575 (1974). *See also Aptheker* v. *Secretary of State*, 378 U.S. 500, 515-17 (1964).

The part of the statute that is unconstitutional on this basis is 15 U.S.C. § 1803(b), the prospective-licensing provision. The section which rescued then-existing arrangements from the

---

[18] All that the opinion does with regard to the second part of the test is to tell this and future Attorneys General that they should disregard both harmful effects upon other newspapers and unnecessarily anticompetitive features of the proposed arrangement. (App. 25a-28a.)

Supreme Court's 1969 ruling that JOA's constituted *per se* violations of the Sherman Act, § 1803(a), would not be affected.

This Court's long-established rule against vague and discretionary grants of licensing power where the exercise of First Amendment rights may be affected requires that 15 U.S.C. § 1803(b) be held unconstitutional on its face.

CONCLUSION

This case is of exceptional importance to the public and the press. For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM L. DWYER
JOHN S. EBEL
KATHLEEN L. ALBRECHT

CULP, DWYER, GUTERSON & GRADER
27th Floor, One Union Square
Seattle, Washington 98101-3143
Attorneys for Petitioners

DATED: July 18, 1983.